

89-680
No.

BOSTON COURT, U.S.
FILED
OCT 16 1989

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

JOSEPH F. SPANIOL, JR.
CLERK

JAMES B. BEAM DISTILLING CO.,

Petitioner,

v.

STATE OF GEORGIA, JOE FRANK HARRIS,
individually and as Governor of the State of Georgia,
MARCUS E. COLLINS, individually and as Georgia State Revenue
Commissioner, and CLAUDE L. VICKERS, individually and as
Director of the Fiscal Division of the Department of
Administrative Services,

Respondents.

On Petition For Certiorari
to the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

Counsel of Record for Petitioner:
JAMES B. BEAM DISTILLING CO.,

JOHN L. TAYLOR, JR.
VINCENT, CHOREY, TAYLOR & FEIL
A Professional Corporation
Suite 1700, The Lenox Building
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 841-3200

MORTON SIEGEL
SIEGEL, MOSES & SCHOENSTADT
10 East Huron Street
Chicago, Illinois 60611
(312) 664-8998

Additional Counsel:

MICHAEL A. COLE
VINCENT, CHOREY, TAYLOR & FEIL
A Professional Corporation
Suite 1700, The Lenox Building
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 841-3200

QUESTION PRESENTED FOR REVIEW

- I. When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief?¹

¹The issue presented here is identical to that now pending before the Court and scheduled for additional briefing and argument in *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, ___ U.S.___, 109 S.Ct. 3238 (1989). See also *American Trucking Associations, Inc. v. Smith*, former decision, 483 U.S. 1014, 107 S.Ct. 3252; 109 S.Ct. 389; 109 S.Ct. 1110, being considered together with *McKesson* on this issue.

LIST OF PARTIES

Plaintiff James B. Beam Distilling Co.'s parent corporation is American Brands, Inc., a Delaware corporation. Plaintiff has one less than wholly-owned subsidiary, which is DICO Holding Co., a Kentucky corporation.

TABLE OF CONTENTS

| | |
|--|-----|
| QUESTION PRESENTED FOR REVIEW | i |
| I. When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the State provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the State elect to provide only prospective relief? | i |
| LIST OF PARTIES | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | iv |
| REPORTS OF OPINIONS DELIVERED BY THE COURTS BELOW | 1 |
| STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED | 1 |
| STATUTE WHICH THE CASE INVOLVES | 2 |
| STATEMENT OF THE CASE | 2 |
| BASIS FOR FEDERAL COURT JURISDICTION | 7 |
| ARGUMENT | 7 |
| CONCLUSION | 12 |

TABLE OF AUTHORITIES

CASES

| | |
|--|---------------|
| <u>Bacchus Imports, Ltd. v. Dias</u> , 468 U.S. 263, 104 S.Ct. 3049 (1984) | 2, 4-6, 8, 11 |
| <u>Chevron Oil v. Huson</u> , 404 U.S. 97, 92 S.Ct. 349 (1971)6-8, 10 | |
| <u>Flewellen v. Atlanta Casualty Company</u> , 250 Ga. 709, 300 S.E.2d 673 (1983) | 7, 8 |
| <u>James B. Beam Distilling Co. v. State of Georgia</u> , Nos. 46642, 46681, slip op. (Supreme Court of the State of Georgia, July 14, 1989) | 9 |
| <u>McKesson Corporation v. Division of Alcoholic Beverages and Tobacco</u> , ____ U.S. ___, 109 S.Ct. 3238 (1989) | 2, 12 |
| <u>Norton v. Shelby County</u> , 118 U.S. 425, 6 S.Ct. 1121 (1886) | 10 |

STATUTES

| | |
|-----------------------------|--------|
| 28 U.S.C. § 1257(a) | 1, 7 |
| O.C.G.A. § 3-4-60 | 2-5, 7 |
| O.C.G.A. § 48-2-35(a) | 2, 9 |

REPORTS OF OPINIONS DELIVERED BY THE COURTS BELOW

The decision of the Superior Court of Fulton County, State of Georgia, is not reported. The decision of the Supreme Court of the State of Georgia has not yet been reported but a copy of that decision is Exhibit "A" to the Appendix to this Petition.

STATEMENT OF THE GROUNDS ON WHICH
THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of the State of Georgia sought to be reviewed was dated and entered on July 14, 1989.

The Order denying the Petitioner's Motion for Rehearing before the Supreme Court of the State of Georgia was dated and entered on July 26, 1989.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. § 1257(a).

STATUTE WHICH THE CASE INVOLVES

The statute which the case involves is O.C.G.A. § 3-4-60.² Its verbatim text is included in the Appendix, Exhibit "B"

STATEMENT OF THE CASE

This case arises out of James B. Beam Distilling Company's (hereinafter "James Beam") action in the Superior Court of Fulton County, State of Georgia, for the refund of taxes illegally assessed and collected from James Beam under a statute that was declared both by the trial court and the Supreme Court of the State of Georgia to be unconstitutional under this Court's holding in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049 (1984). O.C.G.A. § 48-2-35(a) requires that a Georgia taxpayer be refunded all taxes "determined to have been erroneously or illegally assessed and collected" James Beam paid the taxes and in 1985 sought a refund of taxes paid in 1982, 1983 and 1984 under this statute. In McKesson

²The statute in question was amended effective 1985. The Appendix includes only the pre-amendment version, which is applicable to the facts of this case.

Corporation v. Division of Alcoholic Beverages and Tobacco, ___

U.S. ___, 109 S.Ct. 3238 (1989), this Court specifically ordered additional briefing and argument on the following issue:

When a taxpayer pays under protest a state tax found to violate clearly established law under the Commerce Clause must the state provide some form of retrospective relief, such as a tax refund or an offsetting tax on past beneficiaries of the tax preference, or may the state elect to provide on a prospective relief?

This identical issue was presented to and passed upon adversely to the taxpayer in this case by the Supreme Court of the State of Georgia. Therefore, the Petitioner now requests grant of certiorari so that this matter may be considered with its counterparts now pending before this Court.

The taxes paid by James Beam were paid pursuant to O.C.G.A. § 3-4-60 which, prior to 1985, granted preferential taxing treatment to alcoholic beverages manufactured from Georgia-grown products. Prior to 1985, the statute taxed locally produced "distilled spirits" at \$.50 per litre and locally produced alcohol at \$.70 per litre, while taxing their counterparts

manufactured outside Georgia at \$1.00 and \$1.40, respectively. See Appendix, Exhibit "B". In 1982, James Beam paid taxes in the amount of \$649,000.00; in 1983, in the amount of \$857,000.00; and in 1984 in the amount of \$894,000.00. Then in 1985, in the wake of Bacchus Imports, Ltd. v. Dias, O.C.G.A. § 3-4-60 was superficially amended in an attempt to correct its constitutional impropriety.

In the trial court James Beam sought and was granted summary judgment on its contention that the taxes it paid during the years in question were illegally assessed and collected because O.C.G.A. § 3-4-60, as it existed and was applied during the years in question, was unconstitutional, both in its purpose and effect. Relying on the authority of Bacchus Imports, Ltd. v. Dias, Beam asserted that the unconstitutional purpose and effect of O.C.G.A. § 3-4-60 were to discriminate against out-of-state producers of alcoholic beverages and unfairly to promote local commerce in the form of in-state producers. The unconstitutional purpose and effect were achieved by applying a tax rate to alcoholic beverages manufactured elsewhere and

imported into Georgia that was greater than the tax rate applied to in-state producers.

In the Bacchus case this Court overturned as unconstitutional a tax imposed by the State of Hawaii identical in operation to O.C.G.A. § 3-4-60. The Hawaii statute imposed a twenty percent (20%) tax on sales of liquor at wholesale; however, certain alcoholic beverages made from locally grown products were exempted from the tax. This Court held that the Hawaii tax was discriminatory and unconstitutional on its face. Therefore, James Beam alleged in the trial court, and the court so ruled, that O.C.G.A. § 3-4-60 was an unconstitutional infringement upon interstate commerce under Bacchus. A copy of the trial court's decision is included as Exhibit "C" to the Appendix.

Not only did the trial court hold that the effect of the statute was unconstitutionally discriminatory, but also found at ¶ 5 of its Conclusions of Law that the purpose/intent of the statute amounted to simple economic protectionism, "i.e., to foster . . . local industries by encouraging increased consumption

of their product." Bacchus, 468 U.S. at 269, 104 S.Ct. at 3054.

On appeal, the trial court's rulings were upheld by the Georgia Supreme Court. However, both the trial court and the Supreme Court of the State of Georgia held that their rulings as to constitutionality were to be given prospective application only so as to deny James Beam a refund of the taxes it had paid under the unconstitutional statute. In its Order of July 14, 1989, the Georgia Supreme Court determined that, rather than applying the strict letter of a Georgia statute mandating a refund, it would apply the balancing of equities test prescribed by this Court in Chevron Oil v. Huson, 404 U.S. 97, 92 S.Ct. 349 (1971), to determine the issue of retroactive application of a judicial decision.

Petitioner James Beam filed a timely petition for rehearing with the Georgia Supreme Court. The Court denied the Petitioner's Motion for Rehearing, without opinion, on July 26, 1989. The Petitioner files the instant Petition for Writ of Certiorari with respect to the judgment of the Supreme Court of the State of Georgia.

BASIS FOR FEDERAL COURT JURISDICTION

The United States Supreme Court has jurisdiction over the Petitioner's case under 28 U.S.C. § 1257(a).

ARGUMENT

By upholding the trial court's prospective application of its ruling that the pre-1985 version of O.C.G.A. § 3-4-60 was unconstitutional, the Supreme Court of the State of Georgia improperly denied Petitioner James B. Beam Distilling Company a refund of the taxes paid by James Beam pursuant to the offending statute during the years of 1982, 1983 and 1984. In support of its decision to apply its ruling prospectively only, the Georgia Supreme Court relied principally, beginning at p. 2 of its decision, on Flewellen v. Atlanta Casualty Company, 250 Ga. 709, 300 S.E.2d 673 (1983), wherein the Georgia Supreme Court adopted the three-pronged test of Chevron Oil v. Huson, 404 U.S. 97, 92 S.Ct. 349 (1971), to determine whether a judicial decision is to be applied retroactively.

Critically, before the Georgia Supreme Court in this appeal was the issue of whether a decision holding a state

statute violative of the United States Constitution under the Commerce Clause shall require a refund to the taxpayer of taxes paid pursuant to the offending statute. That issue was not presented in Flewellen or Chevron Oil and therefore, those cases are not properly applicable to the facts of this case, which involves the unconstitutional taking of property by the duly constituted taxing authority. Without considering whether its decision amounted to an effective denial of Petitioner's rights under the United States Constitution, the Georgia Supreme Court simply adopted the "balancing equities" approach endorsed by this Court in its Chevron decision. However, as this Court noted in Bacchus, where constitutional rights are involved, the issue is not so simply resolved:

These refund issues, which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce, were not addressed by the state courts [in earlier cases]. Also, the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law [i.e., by a refund statute].

468 U.S. at 277; 104 S.Ct. at 3058 and n. 14. However, in the instant case, although there is a state statute that would have obviated the federal constitutional considerations, the Georgia Supreme Court refused to apply it, so as to deny the Petitioner its federal constitutional right to a refund of taxes assessed in violation of the Commerce Clause.

In support of its decision the Georgia Supreme Court stated:

We are not persuaded by Beam's argument that O.C.G.A. § 48-2-35(a) mandates retroactive application of the constitutional decision. The statute provides, 'a taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him . . .' The statute does not describe how it should be determined that a tax was 'illegally assessed.' It simply does not address the issue of retroactive versus prospective application of a constitutional decision.

James B. Beam Distilling Co. v. State of Georgia, Nos. 46642, 46681, slip op., n.2 (Supreme Court of the State of Georgia, July 14, 1989) See Appendix, Exhibit "A". The Georgia Supreme Court used this circular reasoning to deny the taxpayer the

refund to which it was entitled. Yet, as pointed out in the dissent in the Court's July 14 opinion, an unconstitutional statute is void ab initio, and is thus unconstitutional and illegal from the moment of its inception. See, e.g., Norton v. Shelby County, 118 U.S. 425, 6 S.Ct. 1121 (1886). Thus, considerations as to when the collection of the tax revenue from James Beam became "unconstitutional or illegal" should not have entered into the Georgia Supreme Court's consideration. Further, neither Chevron Oil nor the Georgia cases cited by the Georgia Supreme Court applying Chevron Oil involve an underlying statute declared to be violative of the United States Constitution, and thus void ab initio. Therefore, those cases are not controlling.

As one author has noted:

The use of the prospectivity doctrine detracts attention from the real issues at stake, which are the State's sovereign right to preserve its treasury and the competing interest of taxpayers to a clear and certain remedy for constitutional violations. The complete denial of a refund resolves the tension between these competing interests entirely in favor of the State.

Such an unbalanced resolution threatens the very purpose of the Commerce Clause.

Tatarowicz, Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Taxes Under the Commerce Clause, 41 Tax Lawyer, 118-119 (Fall 1987).

Petitioner was denied a refund of substantial taxes paid pursuant to a Georgia statute determined by a Georgia trial court and the Supreme Court of the State of Georgia to be unconstitutional under Bacchus Imports, Ltd. v. Dias. Obviously, the remedy accorded the victims of unconstitutional taxation is bound up in the enforcement of constitutional protection. In other words, it may be that the denial of a refund of unconstitutionally collected taxes in and of itself amounts to an unconstitutional deprivation of property, as suggested in Bacchus.

That issue is squarely before this Court on appeal in McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 109 S.Ct. 389 (1989), scheduled for further briefing and argument during October Term on the very question at issue in this petition.

CONCLUSION

Petitioner would be bound by this Court's ruling in McKesson, and the Court would need not consider briefs and argument in a separate appeal since these two matters, identical in nature, may be considered together. Therefore, Petitioner submits that this Court should grant certiorari to consider its case because it presents an important question of law regarding retroactive relief from statutes violative of the United States

Constitution, which question has not yet been but should be settled by this Court.

Respectfully submitted,

JOHN L. TAYLOR, JR.
Counsel for the Petitioner
James B. Beam Distilling Co.

VINCENT, CHOREY, TAYLOR & FEIL
1700 The Lenox Building
3399 Peachtree Road
Atlanta, Georgia 30326
(404) 841-3200

MORTON SIEGEL
Counsel for the Petitioner
James B. Beam Distilling Co.

SIEGEL, MOSES & SCHOENSTADT
10 East Huron Street
Chicago, Illinois 60611
(312) 664-8998